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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CUATECONZTI H. ARMAS, Defendant and Appellant.	A125201 (Napa County Super. Ct. No. CR144499)

Defendant Cuateconzti H. Armas waived jury trial and submitted the allegation he committed one count of attempted first degree burglary (Pen. Code, §§ 459, 460, subd. (a), 664)[1] to the court on the preliminary hearing transcript, photographs, police reports, and the testimony of police officers. The court found him guilty, and he timely appeals. We affirm the judgment.

FACTS

On February 4, 2009, at approximately 12:30 a.m., Miriam Ramirez and her husband, Hector Barragan, returned by car to their one bedroom apartment on Pope Street in St. Helena. As Ramirez drove up to the rear of the apartment she saw that the gate separating the backyard from the driveway was open. While the car headlights were still on, Ramirez saw a Latino male wearing gloves run out the gate, past the car.

Ramirez parked the car, and the couple entered the backyard through the open gate. As they approached the rear door to their apartment, they observed the outer screen

[1] All further statutory references are to the Penal Code unless otherwise indicated.

door was wide open. The door behind the open screen door was still locked. The couple had been careful to close and secure both the gate and screen door ever since December 2008, when their home was burglarized. They called the police.

Officers Hartley and Collinson of the Napa County Police Department responded to a report of an attempted burglary. The dispatch stated the suspect was a heavy set Latino male in his early twenties wearing a white T-shirt, black gloves, and blue pants. Collinson and Hartley first briefly checked the immediate area because Hartley recalled seeing a suspect matching this description in front of the residence approximately 15 minutes earlier. While Hartley continued to search, Collinson went to the residence to interview Ramirez and Barragan. Ramirez informed Collinson the man she saw running out the gate wore a shirt inscribed with the word "DADA."

In the meantime, Hartley spotted defendant on Pope Street. He noticed defendant was sweating despite an outside temperature of "roughly 35 degrees" and wearing a glove on one of his hands. When he asked defendant what he was doing, defendant said he lived approximately a half block away and was just going out for a walk. Defendant also stated his other glove was in his apartment.[2] While Hartley was talking to defendant, he heard a second dispatch including the new detail regarding the word "DADA" on the T-shirt. He asked defendant to lift up his sweatshirt. When Hartley saw the word "DADA" he radioed Collinson. Officer Collinson took Ramirez to the scene. Ramirez positively identified defendant as the person she had seen fleeing from her backyard. She later informed both officers she had seen defendant once before when he had a brief conversation with her at her place of employment. After placing defendant under arrest, Hartley asked defendant if they could check the address where he claimed to live. Defendant agreed. The apartment was vacant except for a case of warm beer. According to the landlord, defendant had lived in the apartment but was supposed to have vacated the premises on February 1, 2009.

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[2] The gloves were "half gloves" which did not cover the fingertips. After defendant was placed under arrest the other glove was found in his front pocket.

On March 3, 2009, Officer Collinson returned to Ramirez's and Barragan's residence to take photographs. One of the pictures showed the wooden gate to the backyard closed, but another showed the wooden gate appeared to be ajar.

ANALYSIS

Defendant contends the evidence is insufficient to support his conviction because: (1) no eyewitness saw him open the gate, the screen door, or attempt to enter the back door to the residence, and the solid door behind the screen door showed no pry marks; (2) no finger prints or other physical evidence linked him to the premises; and (3) contrary to Ramirez's assertion she and her husband always kept the backyard gate and screen door closed, one of the photographs taken by Officer Collinson on March 3, 2009, showed the gate open. He also contends, even if he did open the screen door, that act does not constitute an "entry" within the meaning of section 459.

Preliminarily, we note defendant's focus on whether opening a screen door constitutes an "entry" is misplaced because the court convicted defendant of attempted burglary, not the completed offense.[3] (*People v. Valencia, supra*, 28 Cal.4th at p. 11 [burglary requires proof of entry into an inhabited dwelling with intent to commit theft or

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[3] Application of the reasonable belief test to determine whether penetration of a particular part of a building constitutes "entry" is a question of law. (*People v. Thorn* (2009) 176 Cal.App.4th 255, 268.) An entry occurs when any part of defendant's body, a tool, or other instrument penetrates an "outer boundary," which includes "any element that encloses an area into which a reasonable person would believe . . . a member of the general public could not pass without authorization." (*People v. Valencia* (2002) 28 Cal.4th 1, 11.) The *Valencia c*ourt cited with approval cases using the reasonable belief test to conclude "*a screen door* to an enclosed porch of a house" and "a locked gate covered with iron mesh in front of an enclosed and roofed front stairway of a house" constituted part of a building's outer boundary. (*Ibid.*, italics added.) The *Valencia* court held, in turn, "a window screen is clearly part of the outer boundary of a building for purposes of burglary." (*Id.* at p. 12; see also *People v. Nible* (1988) 200 Cal.App.3d 838, 845 [holding window screen is part of outer boundary, and, in dicta, stating same conclusion would apply to a screen door].) Although the reasoning of *Valencia* appears to apply equally to opening a screen door to the back door of a residence, we need not decide the question because the evidence need only show defendant committed a direct but ineffectual act toward commission of burglary.

any felony].) It has long been established to prove *attempted* burglary it is not necessary to prove the defendant entered "any part of the building." (*People v. Hope* (1882) 62 Cal. 291, 298-299.) " 'Although mere preparation such as planning . . . is insufficient[,] . . . acts which indicate a certain, unambiguous intent to commit that specific crime, and . . . are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]' [Citation.]" (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.) Therefore, we must uphold defendant's conviction of attempted burglary if substantial evidence supports a finding of intent to commit it, and *a direct but ineffectual act* toward its commission. (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

The standard of review applicable to a claim of insufficiency of evidence is well-established: "A reviewing court . . . determines 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] We examine the record to determine 'whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] Further, 'the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' [Citation.]" (*Ibid.*)

Given that Ramirez and Barragan returned to their residence during the wee hours of the morning, it is a reasonable inference defendant was not in their backyard and did not open their screen door to carry on ordinary, lawful business. His immediate flight when they drove up reinforces that inference. With the headlights still on, Ramirez saw defendant fleeing the backyard through a gate, and observed the screen door leading to the back door of their home was wide open. Although neither Ramirez nor Barragan saw defendant open the gate or the screen door, it is a reasonable inference defendant opened

both, because the couple usually kept both the gate and the screen door closed. A short while later, defendant was apprehended near their home. He was sweating despite the very cold temperature outside, and his explanation he was just out for a walk was inconsistent with his physical condition. Further, his claim that he lived nearby proved to be false. He was wearing a distinctive T-shirt identical to the one Ramirez had seen on the man fleeing her backyard, and she positively identified him at the scene.

The foregoing constitutes substantial evidence that: (1) defendant was the person Ramirez and Barragan saw fleeing; (2) he opened their gate and screen door; and (3) had he not been interrupted, he would have entered their residence with intent to commit theft or another felony. It also constitutes substantial evidence of a direct but ineffectual act beyond mere preparation toward the commission of burglary. (See e.g., *People v. Davis* (1938) 24 Cal.App.2d 408, 409-410 [approach to bedroom window, coupled with flight upon being asked what he was doing, constituted acts beyond mere preparation to support attempted burglary].)

Defendant's arguments challenging the sufficiency of this evidence are unavailing: The absence of *direct* testimony of a witness who actually saw him open the gate, or the screen door, or of physical evidence such as finger prints linking him to the scene, is immaterial because we must accept all reasonable inferences drawn by the trier of fact supported by circumstantial evidence. (See *People v. Catlin*, *supra*, 26 Cal.4th at p. 139.) Officer Hartley's testimony defendant was sweating when apprehended nearby, the fact he wore the distinctive T-shirt and gloves, and Ramirez's positive identification of defendant, coupled with her statement she and her husband kept the gate and screen door closed, supports a reasonable inference defendant was the person who was in their yard, and who opened the gate and screen door. The absence of pry marks on the door does not preclude the inference defendant intended to gain entry, because a trier of fact could conclude their absence merely indicates he was abruptly interrupted. Defendant's reliance upon the photograph showing the backyard gate open to undermine the

credibility of Ramirez's assertion the gate and screen door were always closed also fails because we must defer to the credibility determinations of the trier of fact and resolve all evidentiary conflicts in favor of the judgment. (*In re S.A.* (March 15, 2010, D055148) ___ Cal.App.4th ___ [2010 WL 892089, 8]; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 199.)

In a variation of the same theme, defendant exhaustively summarizes evidence in numerous other cases found sufficient to uphold convictions for burglary or attempted burglary, and contends the absence of several categories of evidence present in those cases precludes our conclusion substantial evidence supports the conviction in this case. Most of the cases defendant cites involve the completed offense of burglary rather than an attempt (e.g., *People v .Valencia, supra*, 28 Cal. 4th at pp. 3-5*; People v. Elsey* (2000) 81 Cal.App.4th 948, 950-952; *People v. Moore* (1994) 31 Cal.App.4th 489, 490, 492-493; *People v. Nible, supra*, 200 Cal.App.3d 838, 842-843) or do not even address the sufficiency of the evidence (e.g., *People v. Askey* (1996) 49 Cal.App.4th 381, 384-385 [conviction was for attempted burglary but issue concerned sentencing]). In any event, we need not engage in detailed comparison of the facts in those cases to the evidence before us because the substantial evidence test requires an examination of the record as a whole, and depends upon the particular facts in each case. The mere fact certain evidence is held sufficient to support a conviction in particular case, does not stand for the proposition the evidence would be insufficient without it, or that different evidence could not also be sufficient to uphold the conviction in another case.

CONCLUSION

The judgment is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.